

1 of those going to the jury.

2 THE COURT: Joint Exhibit, what, Roman
3 Numeral --

4 MR. ARNTZ: Joint Roman Numeral I is
5 the videotape cassette of the Elofskey interview. And
6 State Exhibit 79 is the cassette of the Polson
7 interview.

8 THE COURT: All right. Dealing with
9 these then in the order to which they were objected
10 to. All other objects not objected to, the Court will
11 admit.

12 MR. ARNTZ: That's correct.

13 THE COURT: All other exhibits then
14 with the exception of those objected to at the time
15 will be admitted.

16 And the first numerical
17 objection relates to 38. 1 through 37 are admitted.
18 That is the gun envelope which includes the dark gun,
19 as I have it, the magazine and three live rounds. Any
20 argument, Mr. Slavens?

21 MR. SLAVENS: I think there's been a
22 sufficient gathering of the, the collection of that
23 gun by Rick Smith, who's marked it and tagged it and
24 so identified it in front of the Court.

25 THE COURT: Does the defense want to be

1 heard on that?

2 MR. ARNTZ: I think that item was not
3 connected to this defendant. The recovery of it
4 specifically was not related in any way to this
5 defendant's possession immediately prior to it.

6 THE COURT: All right. The objection
7 to 38 will be overruled. That will be admitted.

8 Now, as it relates to
9 number 42 is the next one.

10 MR. ARNTZ: That's correct.

11 THE COURT: 39 through 41 will be
12 admitted.

13 42 is a package with a
14 shirt and stocking in it. What's the State's position
15 on that?

16 MR. SLAVENS: We believe as to that
17 specific exhibit with the two items, there is ample
18 testimony concerning the, what I will call, the
19 stocking as to where it was located and to one
20 witness, I recall, vividly described how this
21 defendant, Weston Lee Howe, did, in fact, did have the
22 stocking in his hand. That was Patrolman Wiesman
23 coming up upon him. And, therefore, I think
24 abundantly clear that matter is related to this
25 defendant.

1 Green shirt, it's in the
2 photograph itself. Also, I mean, as a photograph
3 indicates and referenced in the exhibit as to where it
4 was found. I will admit it's not in the exact
5 location as to where this defendant was finally
6 located and/or where Polson was located but it's
7 across the path that they traveled as they came
8 between the two houses. And Polson's, if you will,
9 lack of shirt, well, as to the green shirt I still so
10 move it to be introduced.

11 The stocking, I think, your
12 Honor, is quite clear as to this defendant.

13 THE COURT: Any rebuttal or response?

14 MR. ARNTZ: There was no testimony
15 connecting the green shirt to our client in any manner
16 whatsoever. As the prosecutor pointed out, nor was
17 the green shirt related to either co-defendants. It
18 was simply found on the ground during a chase, as I
19 understand it. Its probative value is minimal to
20 none.

Also, the stocking, if I
recollect correctly, the State's witness who made
mention of the stocking is, I believe, is the same
State's witness who failed to identify our client in
the course of his testimony and we made objection at

1 that time at side bar. And I think asked the Court to
2 strike his testimony because, again, he was not able
3 to, apparently to point out our client as the person
4 he saw discard anything.

5 MR. MONTA: That was Officer Jackson
6 for the record.

7 MR. SLAVENS: Wiesman is the one who
8 testified about this defendant having a stocking and
9 who did, in fact, identify this defendant.

10 THE COURT: Well, the Court is going to
11 permit the stocking. I don't -- there is only one
12 exhibit though -- Let's do this, because, because the
13 defendant is objecting, the Court will exclude,
14 sustain the objection as it relates to the green
15 shirt, that portion of 43, 42, excuse me, 42. That
16 portion of 42, which is the green shirt. The stocking
17 will be admitted.

18 Let's go off the record a
19 minute.

20 (WHEREUPON, a discussion was held off the
21 record.)

22 THE COURT: 42, the stocking has been
23 admitted and Mr. Slavens has suggested that it be
24 remarked 42-A for an individual package. That will be
25 done. The shirt will be kept with the rest of the

1 exhibits that are not admitted.

2 MR. SLAVENS: You want to do that now.

3 (WHEREUPON, State's Exhibit 42-A was marked
4 for identification.)

5 THE COURT: The next exhibit is,
6 objection is to what?

7 MR. SLAVENS: 43, the Raven.

8 THE COURT: You want to be heard on
9 exhibit 43, the Raven?

10 MR. ARNTZ: We feel that 43 was not
11 related to or connected to our client sufficiently to
12 be admitted. We feel that no one has identified that
13 weapon to the effect that our client was actually in
14 possession of it or used it in any manner.

15 THE COURT: Mr. Slavens.

16 MR. SLAVENS: I don't believe that's the
17 correct test anyway but irrespective of that, I think
18 the gun has been fully properly marked, tagged,
19 identified and connected up, one, to this whole case,
20 basically all, or the two other defendants who
21 testified.

22 THE COURT: All right. Exhibit 43 will
23 be admitted.

24 All the exhibits 44 through
25 47 are admitted.

1 48 there is an objection.

2 That's the box of contents apparently found in the
3 sewer. Does the defendant want to be heard on that?

4 MR. MONTA: Judge, what we are
5 objecting to are the items which are not clearly
6 marked as belonging to anybody involved in this case.
7 They were scattered in the sewer and collected. Some
8 things are not identifiable and were not identified at
9 trial as belonging to the decedent McDonald.
10 Certainly the things that have his name on it, connect
11 up to some testimony that it was in that location but
12 not all of them. We think if it all gets in, it will
13 be prejudicial.

14 THE COURT: I'm not sure as to the
15 level of prejudice but what are we talking about, what
16 other kinds of items?

17 MR. MONTA: There is a billfold. I
18 don't know that that is identifiable. There is
19 something called a prayer card, which I think would be
20 clearly prejudicial, arousing sympathy.

21 THE COURT: Do you have a photograph of
22 what was found?

23 MR. SLAVENS: Yeah, there is a photograph
24 of State's Exhibit 47 and it's basically a downward
25 shot into the sewer before the items were collected by

1 evidence technician Rick Smith. And I think that
2 photograph is clear as to what was removed as well as
3 was Rick Smith's testimony from what he removed from
4 the sewer.

5 THE COURT: Of these items that are
6 depicted in 47, how many of them have Mr. McDonald's
7 some form of identification.

8 MR. SLAVENS: I don't know, your Honor.

9 THE COURT: There were at least a
10 couple.

11 MR. SLAVENS: Oh, definitely.

12 MR. LAWSON: Several.

13 MR. SLAVENS: Yeah.

14 THE COURT: 48 will be admitted.

15 MR. MONTA: In its entirety?

16 THE COURT: In its entirety. Let the
17 record reflect after the review of State's Exhibit 47
18 and conjunction with the testimony of the witness who
19 retrieved the items, along with the testimony of the
20 other witnesses, specifically, but not necessarily
21 exclusive of Mr. Polson and Mr. Elofskey, it's rather
22 clear that, that these items are heavily
23 circumstantially connected.

24 48 will be admitted.

25 49 through 78 will be

1 admitted.

2 80-A the coroner's slide
3 has already been objected. Anything further for the
4 record.

5 MR. MONTA: No.

6 THE COURT: That will be admitted.

7 81-A through E is admitted. The rest of 80 is
8 admitted.

9 The objections to 79 and
10 Joint Exhibit I, Mr. Slavens, here's your opportunity
11 to make a record that you've been wanting to make.

12 MR. SLAVENS: I'm done.

13 THE COURT: Are these -- these are the,
14 one is a joint exhibit that apparently the defense is
15 objecting to, am I correct on that?

16 MR. MONTA: Right.

17 THE COURT: The other is State's
18 Exhibit 79. In summary, it's the Elofskey taped
19 statement to the Dayton Police Department and the
20 Polson taped interview to the Dayton Police
21 Department. Do you want to make a record on this?

22 MR. SLAVENS: Well, I think we already
23 done so. So the record is clear, we believe that both
24 tapes, one, have been properly authenticated, two,
25 that both tapes relayed to the various evidence rules

1 that we previously mentioned to the Court. One of
2 which was the Evidence Rule 803(3)(B) an intent, plan,
3 motive or design as to the declarant's participation
4 therein.

5 And also and more
6 specifically, these individuals, Mr. Polson and
7 Mr. Elofskey, having undergone extensive
8 cross-examinations as to their reason for this recent
9 fabrication and plea bargain and they're here to lie
10 today in court when in fact these defendants,
11 co-conspirators made prior oral and videotaped
12 statements to the police department and therefore
13 their prior consistent statements are admissible under
14 Evidence Rule 801(D)(1)(b) and we so move the Court.

15 THE COURT: Does the defendant want to
16 be heard?

17 MR. ARNTZ: Well, only --

18 THE COURT: Over and above what's
19 already been said.

20 MR. ARNTZ: No, nothing more than what
21 we would have said previously on the record.

22 THE COURT: The objection is sustained.
23 Let the record reflect those two videotapes were
24 played to the jury ultimately with no objection, as I
25 recall, from either party in both cases and the Court

1 feels to admit them as exhibits would give undue
2 weight to that particular portion of the testimony.

3 MR. SLAVENS: May we be heard on that
4 portion of the Court's ruling?

5 We believe that there are,
6 I may be wrong in this, but as exhibits are in fact
7 admissible and then the question becomes, whether or
8 not the jury wants to see them and if the jury then
9 decides that they, the jury, wishes to review those
10 items, that a video playing mechanism be given to the
11 jury. But I think at this point in time for the Court
12 to assume that the jury does not want to listen to the
13 tape, would be an infringement upon the jury's
14 deliberation process. And we believe that the items
15 should be accepted into evidence, go to the jury, and
16 then if the jury wishes to view them, make them
17 available for a view.

18 THE COURT: I'm not sure what I said in
19 the record but, Mr. Slavens, I think I said just the
20 opposite of what your argument -- read back was the
21 reason.

22 MR. SLAVENS: You can restate it.

23 THE COURT: Just read back, would you,
24 Joyce.

25 (WHEREUPON, the Court Reporter read back the

Court's last statement.)

THE COURT: That's my reason. And
sustained.

MR. SLAVENS: Note our exception.

THE COURT: Your exceptions are noted.
Any other exhibits we need
-th?

MR. ARNTZ: None.

THE COURT: All right. Are we prepared to go forward with the motions at this time or are we going to wait?

MR. SLAVENS: I think there is a couple
stipulations that we agreed to.

THE COURT: Do you want to do that in front of the jury?

MR. SLAVENS: We can or we can do it now,
just so the lawyers are clear on it and we can redo.

I, I think basically the stipulations would be if Denise Rankin were called to testify, she would testify that the blood sample obtained by Marshall Manning at the Richard Blazer, 1912 homicide scene is in fact consistent with the blood typing of Richard Blazer.

Also, an additional second stipulation that if -- to that one. am I correct?

1 MR. MONTA: Answer, I made it here.

2 She made four reports.

3 MR. SLAVENS: What I'm relating to is the
4 blood.

5 MR. MONTA: That seems to be right.

6 MR. SLAVENS: The other stipulation would
7 be that if John Marsh were called to testify, he would
8 testify concerning examinations he conducted regarding
9 latent prints viewed by him taken from the various or
10 the two weapons, I forget the exhibit numbers, but
11 specifically the Bryco and the Raven, and that there
12 are no fingerprints on either of those items of value
13 for him to make a comparison to Howe, Elofskey, or
14 Polson.

15 Secondly, that that witness
16 would testify that he examined some latent prints from
17 the 1912 Tennyson address of Richard Blazer, those
18 prints, latent prints from an area of the door leading
19 out of the house. They were taken and lifted by
20 Marshall Manning. And that those prints matched the
21 known prints of Tony Elofskey.

22 THE COURT: Is that correct, Mr. Arntz
23 or Mr. Monta, as to your understanding of the
24 stipulation?

25 MR. MONTA: Well, we haven't discussed

1 all the elements of them. That's generally what we
2 are talking about.

3 I believe there were, as
4 far as Denise Rankin's testimony, I believe there was
5 also an indication that none of the blood samples from
6 either of the decedents were found on the clothing of
7 our client, Mr. Howe. We would ask for a stipulation
8 of that.

9 THE COURT: Well, apparently we are not
10 at this point prepared on the stipulations then, so.

11 MR. MONTA: Well, the general topics,
12 that's what I just said, I think the general topics we
13 had and the general people who would have given.

14 MR. SLAVENS: As to that one tin. What
15 else? I mean, I was only talking about that, the
16 blood, there some discussion about the blood at Mr.
17 Blazer's house and just that it was his blood.

18 MR. ARNTZ: I think we can arrive at
19 some stipulations to the Court in final form first
20 thing in the morning, if that's of any assistance. We
21 are not just down to the fine print.

22 THE COURT: My only question, assuming
23 there are stipulations, first of all, Mr. Slavens has
24 to be advised because of the, obviously, the need for
25 a witness. And hopefully we can do that. That

1 doesn't necessarily have to be done on the record.

2 Whatever stipulation is worked out, we will put on the
3 record.

4 Do counsel want the Court
5 to read the stipulation to the jury as opposed to
6 either one counsel?

7 MR. ARNTZ: I think we prefer that.

8 MR. MONTA: That will be fine.

9 THE COURT: That's normally how a
10 stipulation is done in at least a lot of cases.

11 MR. SLAVENS: I don't care about the
12 format, just as long --

13 THE COURT: All right. So with that
14 then, assuming the stipulations are worked out as to
15 these two witnesses, Marsh and Denise Rankin, the
16 State, although not formally, resting at this time?

17 MR. SLAVENS: We are going to represent
18 we would more than likely be concluded. Assuming that
19 it is concluded, we'll then be resting.

20 THE COURT: Do we want to deal with the
21 motions then at this point?

22 MR. ARNTZ: We prefer to do that in the
23 morning after we provide the Court with the final form
24 of the stipulation.

25 THE COURT: All right. Can we get

1 started at 9:30 as far as the jury is concerned? So
2 that means everybody is here at 9, we will hit the
3 record at 9:15. Any problem with that timing, Mr.
4 Slavens? And hopefully get going with the jury at
5 9:30. That means Mr. Howe is due back here at 9
6 o'clock. And we'll go ahead and stand in recess.

7 And if I could see counsel
8 for just a minute -- I'm already a half hour late for
9 another meeting -- as to schedule and potential jury
10 charge.

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12 (WHEREUPON, the proceedings for March 2,
13 1993, were then concluded at the hour of 4:48 p.m.)

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(March 3, 1993 - Morning Session)

9:52 a.m.

IN OPEN COURT - OUT OF THE PRESENCE OF THE JURY

THE COURT: Let the record reflect we
are out of the presence of the jury.

Mr. Slavens.

MR. SLAVENS: Yes, your Honor.

I believe, I'm not sure if all of this was on the record yesterday but we'll be resting. I think we moved for the introduction of into evidence the various exhibits. The Court has ruled on those. I think those are on the record. We would like to reserve the right to rest in front of the jury but we will for the record, subject to that caveat, rest our case.

THE COURT: All right. Does the defense have any motions?

MR. MONTA: Thank you, Judge.

At this point under rule, Criminal Rule 29, which allows the Court on motion of defendant, or on its own motion after the State's evidence is closed, to move for acquittal based upon the fact that the evidence is insufficient to sustain a conviction. We make that motion as to all counts

1 and specifications.

2 THE COURT: All right. The motion for
3 the directed verdict, pursuant to Rule 29 of the Ohio
4 Criminal Rules, is overruled.

5 Does the defendant have any
6 other motions as it relates to exhibits or any, or any
7 other matter we want to deal with before we bring the
8 jury in?

9 MR. ARNTZ: We would move at this time
10 for admission of Defendant's exhibits as well.

11 THE COURT: And they are A and B. I
12 believe Joint Roman Numeral I was admitted by the
13 Court yesterday afternoon. Is Joint Exhibit Roman
14 Numeral I the videotape statement?

15 MR. ARNTZ: Excuse me. That was agreed
16 that that would not be admitted.

17 MR. SLAVENS: I disagree with that.

18 THE COURT: As to the agreement?

19 MR. SLAVENS: Yes.

20 THE COURT: It is correct that the
21 Court has excluded the two videotaped versions of
22 Mr. Polson and Mr. Elofskey's testimony.

23 Now as it relates to
24 Defendant's A, this is a hand diagram by Officer
25 Bryant.

1 MR. ARNTZ: Correct.

2 THE COURT: Any objection to that?

3 MR. SLAVENS: No objection.

4 THE COURT: B and C are request forms
5 to see Detective Lawson from Mr. Elofskey while in the
6 county jail.

7 MR. SLAVENS: I voice an objection. I
8 believe, I may be incorrect, that the testimony from
9 that came -- no, I stand corrected. I think it
10 came -- there was testimony about that from Elofskey
11 but he denied one of them and therefore it's
12 inaccurate or has not been authenticated.

13 THE COURT: He did deny one of the
14 four.

15 MR. ARNTZ: If I recall correctly, I
16 think what he said was that he did not recognize one
17 of the four request slips and something he made out in
18 his own handwriting but he also went on to say that he
19 in fact did want to see Detective Lawson on that day,
20 something to that effect.

21 THE COURT: Well, just a minute. Let
22 me actually physically look. I think he denied one of
23 them by case number, jacket number, or whatever it
24 was.

25 MR. SLAVENS: He did. And three of them

1 have the same jacket number. One of them has a
2 different jacket number.

3 THE COURT: The jail request form that
4 was specifically denied by Mr. Elofskey, which is part
5 of Defendant's Exhibit B for identification purposes,
6 its reference is jacket number A 8112-92, that would
7 be sustained and will not go to the jury. It can be
8 eliminated or subtracted from the form upon the other
9 three. Now, with that understanding --

10 MR. SLAVENS: No objection, your Honor.

11 THE COURT: There is no objection from
12 the State as to B and C as amended. And B is the one
13 specifically effected and we'll deal with that.

14 All right. The defense
15 is -- we are over to the defense side of the case.
16 Does the defendant have any testimony to present?

17 MR. ARNTZ: We would be resting as
18 well.

19 THE COURT: And do you reserve the
20 right to do that in the presence of the jury also?

21 MR. ARNTZ: Yes, sir, we would.

22 THE COURT: All right. Pursuant to our
23 discussions then in chambers, what the Court will do
24 is bring the jury in, permit the State to rest, permit
25 the Defendant to rest on the record, then explain to

1 the jury what is next in the process, tell them that,
2 we'll have another relatively brief break, so we can
3 finalize any discussions on instructions, and we'll go
4 from there.

So let's bring the jury in.

6 Anything further before the jury comes in?

7 MR. SLAVENS: No, your Honor.

BEFORE THE JURY

10 THE COURT: Good morning, ladies and
11 gentlemen of the jury.

THE JURY: Good morning.

13 THE COURT: We are moving along.

14 Mr. Slavens.

15 MR. SLAVENS: Yes, your Honor. As we
16 previously indicated and for the record, State rests.

21 Mr. Arntz or Mr. Monta.

22 MR. MONTA: If the Court please, at
23 this time the defense would rest as well.

24 THE COURT: All right. You've heard
25 the State and you've heard the Defense rest.

Now, ladies and gentlemen of the jury, I wanted to bring you in here so you would see this process. The next stage in the proceeding is what's called a closing argument. We are going to get to that in just a few minutes. There is a couple of minor things we need to deal with. You get to take another break. The bottom line to what I'm saying, you now know we are at the concluding portions of the trial, closing arguments by counsel, then the Court will give you instructions of law and then the matter will be in your hands to decide.

So if you would give us approximately 15 minutes, give or take a few either direction, we'd appreciate that, so that counsel and the Court, we have everything together. We will not go solidly through all the closing arguments and instructions without a break. We'll have a break at some point mid route of the next series of events but you should have the case and begin deliberating before noon. So with that, let's take a break.

Remember the usual
instructions of the Court not to discuss the case
among yourselves or with anybody else. We'll see you
back in approximately 15 minutes.

(WHEREUPON, a recess was taken.)

1 IN CHAMBERS

2 10:17 a.m.

3 THE COURT: Let the record reflect that
4 we are in chambers and we are discussing the charge to
5 be given to the jury.

6 A couple of things. First
7 of all, does the defense specifically waive the
8 defendant's presence for the purpose of this brief
9 record?

10 MR. ARNTZ: Yes, we would.

11 THE COURT: The second thing, Mr.
12 Monta, you might want to respond to this because we
13 were just talking about it while Mr. Arntz was not
14 present. But does counsel desire the Court to,
15 defense counsel desire the Court to inquire of the
16 defendant as to whether or not he wants or should be
17 testifying in this case.

18 MR. MONTA: I think we discussed that
19 and indications are at present it's not necessary.

20 MR. ARNTZ: That's correct.

21 THE COURT: All right. So there is no
22 need for the Court to make personal or direct inquiry
23 of the defendant on that subject?

24 MR. ARNTZ: No, sir.

25 MR. MONTA: No.

1 THE COURT: All right. With that then,
2 let the record further reflect we've had a couple of
3 discussions in chambers as it relates to the jury
4 instructions. The defendant has filed a requested set
5 of jury instructions, which the State of Ohio has a
6 copy of.

7 And the bottom line impact
8 is that the Court is sustaining the defendant's
9 request for, motion request for an instruction on the
10 lesser included offense of involuntarily manslaughter.
11 That's branch one.

12 Sustaining as to branch
13 two, labeling, mere presence.

14 The testimony of an
15 accomplice request, which is branch three of that
16 request, has, will also be approved and be given to
17 the jury.

18 Branch four of the
19 defendant's request has been granted, however, the
20 last sentence, that will be cut off. The last
21 sentence will simply read: In determining what
22 weight, if any, should be given the statement or
23 statements, you should consider all the matters in
24 evidence. Period.

25 And the balance of the

1 defendant's requested instruction will not be given as
2 being not necessary and not necessarily the law.

3 MR. ARNTZ: If the Court please, we
4 have also requested an instruction to the jury with
5 regard to what they should do in the event they find
6 equal inferences from the circumstantial evidence.
7 This is an instruction that has traditionally been
8 given for many years in criminal cases and we feel it
9 would be appropriate and necessary today.

10 THE COURT: And that's correct. That
11 also will be given.

12 And I believe I'm correct,
13 Mr. Slavens, when I state that the State has no
14 objection to any of the Court's rulings as it relates
15 to the defendant's request, albeit perhaps
16 reluctantly, but no specific objections. Am I
17 correct? If I'm not, please state.

18 MR. SLAVENS: There is an objection to
19 equal inferences which we, but we recognize the Court
20 is going to give it, for the record, we voice an
21 objection. I just make that objection for the record,
22 your Honor, for whatever purpose the record may have
23 and the State giving an objection.

24 THE COURT: Let the record reflect that
25 for purposes of review, the Court is very much aware

1 of the state of the law as it relates to the requested
2 instruction as it relates to inferences that are
3 equally consistent with each other or are equally
4 consistent with either the defendant being guilty or
5 not guilty, that that's not a necessary instruction.
6 The defendant and the State have both provided copies
7 of the case in view of the nature of this case. The
8 Court will go ahead and give this instruction at the
9 request of the defendant for whatever, whatever
10 purpose it may serve.

11 Now, on the record, does
12 the defendant desire that I not make reference to the
13 fact that he did not testify or that I go ahead and
14 make the standard Ohio Jury Instruction reference that
15 it is his constitutional right not to testify? Of
16 course, I'm summarizing that particular instruction.

17 Mr. Arntz.

18 MR. ARNTZ: We request that the Court
19 give the traditional instruction that he has no
20 obligation to testify.

21 THE COURT: All right. That will be so
22 given.

23 All right. Anything else
24 for the record?

25 MR. SLAVENS: I think the record should

1 show, I think, is the Court going, has the Court, is
2 the Court going to give an instruction on aiding and
3 abetting?

4 THE COURT: The Court will give an
5 instruction of aiding and abetting.

6 MR. ARNTZ: We would object to the
7 Court giving a general instruction on aiding and
8 abetting as to all five of these counts for the reason
9 that the bill of particulars filed February 18th by
10 the State specified that with regard to the homicide
11 counts, the defendant was the principal and that he
12 did the shooting himself.

13 And with regard to the
14 aggravated robbery and aggravated burglary counts, the
15 bill of particulars specifies that he was a
16 participant and provided assistance to the
17 co-defendants with regard to those counts.

18 So our feeling is that the
19 prosecutor has bound himself to those theories of his
20 case which he set forth in the bill of particulars.
21 And the purpose of the bill is to provide notice to
22 the defense what theory the prosecution intends to
23 present at trial. The prosecution attempted to
24 present those theories at trial and we think it is
25 unfair for the prosecution at the conclusion of all

1 the testimony to offer up new theories of culpability
2 by now saying, well, if he wasn't the principal in
3 these homicides, he ought to be convicted as an aider
4 and abettor. We think that defeats the whole purpose
5 of the bill of particulars, in that the prosecutor can
6 declare one theory in advance of trial and in fact
7 throughout the trial and then at the very end of the
8 trial insist that the Court instruct as to another
9 theory. This is a practice which would violate our
10 client's right to due process and a fair trial.

11 THE COURT: Mr. Slavens.

12 MR. SLAVENS: If I may, your Honor, we
13 recognize that the purpose of the bill of particulars
14 is primarily to give the defendant notice. In
15 essence, it is notice pleading. The purpose of giving
16 a jury instruction is to educate the jury as to what
17 the law is, as that law would apply to the facts as
18 presented during the course of the trial. The fact
19 that the State's theory has not, not changed as to
20 any, as who we claim to be the shooter but based upon
21 the evidence, primarily the, one, of the
22 cross-examination is and the inference is made by the
23 defense team in cross-examining Mr. Elofskey and
24 Mr. Polson, and also, based upon the testimony of
25 Detective Lawson concerning statements made by the

1 defendant Howe. There is the possibility that the
2 jury could conclude that in one or both of the
3 homicides that this defendant was not in fact the
4 triggerman but that he was present with all the
5 culpability required as an aider and abettor,
6 therefore, they could so find, it's not a new theory,
7 but I mean the fact that our theory is not new but the
8 evidence, I think, justifies in order to prevent a
9 potential miscarriage of justice that this instruction
10 would be given as it is factually warranted.

11 THE COURT: All right. The Court has
12 indicated to counsel, prior to making the record, the
13 instruction would be given in its general context of
14 the entire factual situation.

15 MR. ARNTZ: We would just like to note
16 our position is that an aiding and abetting
17 instruction might well be appropriate for the
18 aggravated robberies and aggravated burglary, but not
19 as to the homicides.

20 THE COURT: All right. Your position
21 is clear and the Court has ruled. Okay.

22 MR. SLAVENS: Two points. We know the
23 Court has given counsel time in regards to complete
24 their closing arguments, the Court indicated to the
25 jury he will give them a break. I would just, on

1 behalf of State, request at that break be a short one
2 so they can go to the necessary room and then back and
3 I would suggest maybe five minutes.

4 THE COURT: Not only will it be short,
5 I was going to ask counsel as to a logical point,
6 probably at the conclusion of the defendant's closing
7 argument.

8 MR. ARNTZ: We would prefer that the
9 break occur after the State's final argument finishes.

10 THE COURT: Well, there is a rebuttal.

11 MR. ARNTZ: That's what I mean, after
12 the rebuttal.

13 THE COURT: Go through the entire
14 closing arguments then have a five minute break then
15 instructions.

16 MR. SLAVENS: That's fine with me.
17 They're trying to prevent me from preparing for
18 rebuttal. I think that's appropriate time.

19 THE COURT: That's fine. Remember the
20 jury will be sitting there.

21 As we speak, we agreed on a
22 45 time limit, am I correct?

23 MR. ARNTZ: With five minutes fudge
24 factor I think we said.

25 THE COURT: Keep in mind, the longer

1 they're sitting here in the middle of the morning. So
2 we'll do all the closing arguments, we will take a
3 brief break and then come back for the instructions.

4 MR. SLAVENS: May I, your Honor, make a
5 comment? In regards -- I recognize -- I hope the
6 Court does not take an offense to what I'm going to
7 say, but I, recalling back to voir dire examination,
8 not with Mr. Arntz but with comments made by the Court
9 in explaining to this jury the charges, and the Court,
10 I think, maybe at least as I looked at it, please
11 don't take offense to it, stressed quite seriously and
12 numerous occasions the fact that the defendant pled
13 not guilty. And when you did that, you make an
14 inflection in your voice. And your voice does carry
15 quite well. And you denoted, if you will, the
16 seriousness of the situation. I would just ask the
17 Court in giving the instructions to the jury that all
18 instructions be basically with the same inflection. I
19 mean, I think the Court when it gets to certain areas
20 of instruction, may inform the jury this is very
21 important, this is very important. I think all the
22 instructions are equally important. I hope the Court
23 does not take offense.

24 THE COURT: It's in the record.
25 Any response?

1 MR. MONTA: For the record, we didn't
2 notice those inflections.

3 THE COURT: For the record, either did
4 the Court. But I will do what I do. I will let the
5 record speak for itself.

6 THE COURT: Off the record.

7

8 IN OPEN COURT - BEFORE THE JURY

9 10:37 a.m.

10 THE COURT: Ladies and gentlemen of the
11 jury, we are at that point in the trial that's called
12 the closing arguments or closing statements by
13 counsel. We will now proceed with those. Remember,
14 what the lawyers tell you is not evidence. You heard
15 the evidence from the witness stand and the various
16 exhibits. The Court will tell you specifically what
17 the evidence is and what I can tell you is not
18 evidence is what the attorneys say to you at this
19 point. It is a summary of the situation from the
20 attorney's standpoint.

21 Now I want to caution you
22 on a couple of things here. I'm sure I speak for all
23 the lawyers involved. That if an attorney misstates
24 the evidence that you remember to be, I'm saying two
25 things here, I'm sure that it is not done

1 deliberately. There is one of them. That's why there
2 is 12 of you. The second part of that statement is if
3 your recollection differs from that of what you hear
4 the attorneys say that the evidence showed, you rely
5 on your collective memories to determine what the
6 evidence in fact was.

9 MR. DUNDES: Yes, your Honor.

THE COURT: Defense ready?

11 MR. ARNTZ: (Nodded in the
12 affirmative.)

15 MR. DUNDES: Judge Dodge, counsel, Mr.
16 Slavens, ladies and gentlemen of the jury. I would
17 like to take a brief second to thank you for your time
18 and your patience, your attention you've given us in
19 the last two weeks. I know it's been a difficult
20 time. We are close to the end, so I thank you for
21 that.

22 At the beginning of this
23 trial you heard inferences that the State of Ohio
24 would not be able to connect the Mark McDonald
25 homicide and the Richard Blazer homicide. There were

1 statements made that there was no one there to
2 testify. All the State of Ohio had were witnesses
3 what people said happened out there. In a case of
4 this nature we know, counsel knows that the victims,
5 Mark McDonald and Richard Blazer, are deceased. They
6 couldn't come in and testify. They're dead. I wasn't
7 there. Counsel wasn't there. Mr. Slavens wasn't
8 there. You weren't there.

9 At the beginning of this
10 trial you heard testimony from police officers who
11 arrived on the scene where Mark McDonald was murdered
12 at Monument and Findlay. They came in and testified
13 to what they found when they got there. You also
14 heard testimony from police officers at the 1912
15 Tennyson Avenue residence, homicide of Richard Blazer.
16 They came in and they testified what they found when
17 they got there. They weren't there when it happened.

18 But we do know from
19 testimony in this trial from this witness stand that
20 there were people there at each homicide. And how do
21 we know that? Well, we know that this defendant was
22 there. We know that because he told Detective Tom
23 Lawson that he was out there. He was at the Monument
24 and Findlay Street address. In fact, he told this
25 detective that he killed Mark McDonald. We also know

1 that he told this detective that he was at the 1912
2 Tennyson Avenue residence of Richard Blazer. He was
3 there. He told that to Detective Lawson.

Who else was there? You've heard testimony from Walter Polson. You've heard testimony from Tony Elofskey. They were there at the Findlay and Monument Street location. They told you that this defendant killed Mark McDonald. They were also present at the 1912 Tennyson Avenue residence of Richard Blazer. And there is no dispute they told you that this defendant killed Richard Blazer. They were there.

They came in, Walter Polson and Tony Elofskey, and they told you in the early morning hours of June 22d, 1992, that they were together along with this defendant, Weston Lee Howe, Junior. And they met up with Mark McDonald in the area of Deeds Park and Helena Avenue area. And later that evening they met him again in a field at Monument and Findlay Avenue. And they told you when they went out there, that Weston Lee Howe had hid in the front seat and Walter Polson was hidden in the back seat and Walter Polson had a gun, a 25 caliber Raven, silver or nickel plated gun. And that this defendant also had a gun a 25 caliber semiautomatic handgun, a Bryco, which

was black in color. They told you they went out there to rob someone. They go out there. And testimony was that this defendant shot Mark McDonald three times.

Later that evening they get together again and they talk about going out and robbing a person by the name of Richard Blazer. They met him earlier in the afternoon, Walter Polson and Tony Elofskey. The three of them, Tony Elofskey, Walter Polson, and Weston Lee Howe, Junior, went out to 1912 Tennyson Avenue residence. And while there, in an attempt to rob him, he was killed. And he was killed by this defendant as he was exiting his house.

Due to the commission of these crimes, this defendant was indicted by the Montgomery County Grand Jury on five specific counts. And as Mr. Slavens told you earlier, the State has to prove and believes has proved beyond a reasonable doubt each and every element of those separate counts.

Weston Lee Howe, Junior, in

this particular case, Count One, was indicted and charged with aggravated murder, that count carrying with it a firearm specification. Count Two -- that particular count is with regard to Mark McDonald.

Count Two, aggravated
murder with regard to Richard Blazer. That count

1 carries with it a firearm specification.

2 Count Three, aggravated
3 robbery as it relates to Mark McDonald. That count
4 also carries with it a firearm specification.

5 Count Four, aggravated
6 robbery. That counts relates to Richard Blazer. That
7 also carries with it a firearm specification.

8 Count Five, aggravated
9 burglary. That counts relates to Richard Blazer. It
10 also carries with it a firearm specification.

11 Count One, aggravated
12 murder. The State of Ohio has shown beyond a
13 reasonable doubt that in Montgomery County, Ohio,
14 Weston Lee Howe, Junior, on or about June 22d, 1992,
15 did purposely cause the death of Mark McDonald while
16 committing or attempting to commit or while fleeing
17 immediately after committing or attempting to commit
18 an aggravated robbery.

19 How do we know that? Well,
20 we know from the testimony that Tony Elofskey, Walter
21 Polson, and Weston Lee Howe, Junior, went to Monument
22 and Findlay Street address with their purpose to rob
23 Mark McDonald. That was their plan and they did it
24 together. When we went out there, we know that -- let
25 me strike. We know that Walter Polson had a 25

1 caliber gun, a nickel plated gun. We also know that
2 Weston Lee Howe, Junior, had a 25 caliber
3 semiautomatic black Bryco gun. They get out there and
4 Weston Lee Howe, Junior, shoots Mark McDonald three
5 times. Shoots him once in the mouth, once in the
6 chest, and once in the hand. Caused the death of
7 another.

16 Aggravated robbery. Well,
17 there was testimony that Weston Lee Howe, Junior, had
18 on or about his person that black gun after shooting
19 Mark McDonald. We know that Weston Lee Howe, Junior,
20 chased him down. We heard testimony that he followed
21 him and chased him. And after catching him, he took
22 his wallet. He got 5 dollars, 5 dollars from him.
23 There was also testimony that when he got to him, that
24 his gun jammed and he would have shot him again if
25 that wouldn't have happened. And you heard testimony

1 that Walter Polson heard a siren and they both ran to
2 get back in the car with Tony Elofskey. He would have
3 shot him again at that point. That's purposeful.

15 How do we know that? Well,
16 the witnesses testified at this stand, Walter Polson,
17 Tony Elofskey, they got together with Weston Lee Howe,
18 Junior, on June 22d, 1992, and they got together at
19 the Valley Street residence and they discussed that
20 they were going to go out to Richard Blazer's house
21 and rob him. In fact, Weston Lee Howe, Junior said
22 when he got there, he was going to take things of
23 value and sell them.

24 Weston Lee Howe, Junior,
25 goes out to the residence with Tony Elofskey and

1 Walter Polson and waits outside. You heard their
2 plan. They were working together. Weston Lee Howe,
3 Junior, was to stay outside, the other two guys were
4 to go in. That's what happened. Inside is an
5 argument. Richard Blazer comes out the door following
6 Tony Elofskey, he's shot three times by Weston Lee
7 Howe, Junior, shot three times. Shot once in the
8 head, once in the chest and once in the right
9 collarbone, all from the right side as he's exiting
10 the door.

11 And you heard testimony
12 from Dr. Smith that Richard Blazer died from multiple
13 gunshot wounds. And he extracted three bullets from
14 Richard Blazer's body.

15 Bud Haemmerle came in and
16 testified and he told you that the three bullets taken
17 from the body of Richard Blazer came from the same 25
18 caliber Bryco semiautomatic handgun that killed Mark
19 McDonald, same gun, his gun, Weston Lee Howe, Junior's
20 gun, while committing or attempting to commit or fleeing
21 immediately thereafter, aggravated robbery.

1 told you that. They were there. We weren't. They know
2 what was going on. Weston Lee Howe told you he was
3 going to take things and sell them -- I'm sorry -- the
4 evidence would show that is what he was going to do.
5 And when he went out there, he had on or about his
6 person a deadly weapon, a firearm. And you heard
7 testimony from Walter Polson and Tony Elofskey that he's
8 the one that shot and killed Richard Blazer. He had the
9 gun on him.

10 This count also carries a
11 firearm specification. And Bud Haemmerle again came in
12 and testified that the 25 caliber Bryco semiautomatic
13 black handgun is the gun that the bullets from Richard
14 Blazer's body was extracted. It works.

15 Count Three, aggravated
16 robbery. On or about the 22d day of June, 1992, in
17 Montgomery County, Ohio, Weston Lee Howe, Junior, again
18 identified in the courtroom, in attempting or committing
19 a theft offense or in fleeing immediately after such
20 attempt or offense, did have a deadly weapon, a firearm,
21 on or about his person or under his control. This count
22 relates to Mark McDonald. And you've heard testimony
23 over and over again that he was there at the Monument
24 and Findlay Avenue area. And you heard testimony that
25 he had the 25 caliber semiautomatic Bryco black handgun